Supreme Court of the United States.

WILLIAM L. MOORE,
Appellee,

AGAINST

THE SUN PRINTING AND PUBLISHING COMPANY,
Appellant.

POINTS FOR APPELLEE.

This cause is brought here by writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit to review a decree of that Court modifying a decree of the District Court for the Southern District of New York, and remanding the cause to the District Court with instructions to enter a decree for the appellee (the libellant below) for $75,000 and interest from October 1, 1898, with costs to the libellant.

Certiorari, Transcript of Record, p. 284.
Decree, p. 283.

The decree of the District Court, dated August 23, 1899, awarded to the libellant $65,000, with interest and costs, as damages for the loss of the yacht *Kanapaha*, belonging to the appellee, chartered by the appellant, and lost while in the appellant's services.

Decree of District Court, Transcript p. 268.

The appellee (the libellant) appealed to the Circuit Court of Appeals on the ground that the damages awarded were insufficient.

Transcript, p. 277.

The appellant appealed on the grounds that the appellant is not liable at all; and that, if liable, the damages awarded were excessive, being computed upon an erroneous principle.

Transcript, pp. 269–276.

The principal questions, both in the Court below and here are, first, whether the appellant or its agent Lord, who was its managing editor, was the charterer; second, whether the appellant is liable to the appellee for the loss of the vessel pursuant to the stipulations of the charter-party; third, whether the measure of damages is the value of the vessel as stipulated in the charter-party.

The charter-party is Exhibit B annexed to the answer (Transcript, p. 15). It is connected with a contract called an Agreement of Suretyship (Exhibit C, Transcript, p. 16).

Statement of Facts.

I. The appellee was the owner of the *Kanapaha* (p. 23), a steam yacht of 240 tons burden, 187 feet long, 23½ feet beam, drawing 10.10 feet when loaded (p. 190).

The appellant is a corporation engaged in the business of printing and publishing the New York *Sun* (Libel, p. 1; Ans. p. 9).

II. April 1, 1898, the appellee, by Thomas Manning, his agent, described as owner, and Chester S. Lord, on behalf of the appellant described as hirer, executed a charter party, by which the owner let and the hirer hired the *Kanapaha* for the term of two months from the date of the charter, expiring June 1st next

ensuing, for the sum of $5,000, payable on the signing of the agreement.

The charter provides that the owner shall deliver the yacht in Manning's Basin in South Brooklyn to the hirer, or his representative, as it now is and with all its gear, tackle and furnishings as they now are; that the hirer will overhaul and repair and put the yacht in commission at his own expense, and from now on until the expiration of the contract will pay its running expenses including, amongst other things, uniforms, wages, provisions, pilotage, tonnage, light house and port dues and any and all other dues and charges; that he will use it as a yacht only.

The charter contains the following special provisions: the hirer "will surrender said yacht with all its gear, furniture and tackle at the expiration of this contract to the owner or his agent at Manning's Basin, foot 26th Street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness, liens or charges of any kind or of any description;"

Also "the hirer shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like;"

Also "the hirer during the continuance of this agreement shall at all times and at his own cost and expense keep the said yacht, its hull, tackle, spars, furniture, gear, boats, and the like, in repair;"

Also "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of Seventy-five thousand dollars ($75,000.00) and the said hirer shall procure security or guarantee to and for the owner in the sum of Seventy-five thousand dollars ($75,000.00) to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract."

The agreement was signed by Manning, as agent; and by the hirer in the following terms: "Chester S. Lord for the Sun Printing and Publishing Association." (Charter, Exh. A, p. 14).

III. On the same day an instrument described as an "understanding and agreement of suretyship" bearing the same date was executed and delivered to the libellant which recited that, whereas, by the charter party dated April 1, 1898, William L. Moore, called the owner, did or is about to hire or charter unto Chester S. Lord, called the hirer, the steam yacht *Kanapaha*, as will more fully and at large appear by a copy of said charter party "hereunto annexed and hereby made part hereof;" and proceeded to state that at the request of the hirer, and for valuable consideration received from him, and in consideration of one dollar, "We the Sun Printing and Publishing Association of the City of New York, for ourselves and each of us, our successor or successors, and for each of our executors or administrators, enter into the following understanding and agreement of suretyship:

"First. That the said hirer will well and faithfully perform and fulfil everything in and by the said annexed agreement on his part to be kept and performed.

"Second. That we expressly waive and dispense with notice of any demand, suit or action at law against the hirer and expressly waive any and all notice of nonperformance of the terms of said annexed agreement on the part of the hirer to be kept and performed. The intention of this understanding being to hold us primarily liable under the terms of the annexed agreement.

"Third. That our liability hereunto shall in no case exceed the sum of Seventy-five Thousand dollars ($75,000.00).

"In witness whereof we have hereunto set our hands this 1st day of April, 1898."

This instrument is signed "Chester S. Lord, for Sun Printing and Publishing Association." On the same day it was acknowledged by Mr. Lord before a Notary Public, who certified that Lord was known to him "to be the Managing Editor of the Sun Printing and Publishing Company, and who duly acknowledged that he executed the above undertaking for and on behalf of his firm under authority of said Company as its act and deed." (Exh. 12, p. 257 ; cf. pp. 73, 131-2, 212).

IV. May 14, 1898, the yacht being in the possession of the appellant, and in use as a despatch boat in Cuban waters, gathering news of the progress of the Spanish War, a second charter was executed by the same persons.

It provides that the owner lets and the hirer hires the said yacht as she is now for the term of four months from the first day of June, expiring on the first day of October next ensuing, for the sum of $10,000 payable on the signing of the agreement.

It further provides that the hirer will carry out the provisions of the charter party made on the 1st day of April last, "and will until the expiration of this contract keep said yacht in repair and will pay all its running expenses."

The special covenants quoted from the first charter are repeated in this in the same language.

It is signed "Chester S. Lord for the Sun Printing and Publishing Association" and by Manning (Ex. B, p. 15).

V. Concurrently with this charter party a second agreement of suretyship bearing date May 14, 1898, and referring to the second charter party, but in all other respects like the earlier one, and executed and acknowledged in the same way, was made and delivered (Exh. C, p. 16).

VI. The two charter parties and the second agreement of suretyship were produced on the trial by the

appellant (p. 24). The appellee produced the counterparts, and the first agreement of suretyship (pp. 192–3).

VII. Immediately after the execution of the charter of April 1, 1898, the yacht, being then at Manning's Basin (Test. Petersen, p. 25), was delivered to Captain Packard (pp. 26, 28–30) who had been hired at the office of the *Sun* in New York (pp. 180–2), and was taken by Packard's men to Tebo's Dock, 23rd Street, Brooklyn (p. 30), where she lay through the next day. In the morning she was docked for a few hours and afterwards coal and provisions were put on board (pp. 32–3), and that night she sailed for Key West (pp. 33-4).

VIII. The charter money payable under both charters was paid by appellant's checks: the first, by a check for $5,000, dated April 2, 1898, signed in the name of W. M. Laffan, Manager, by L. O. Macdaniel, (Exh. 6, p. 44); the second, by a check for $10,000 dated May 14, 1898, signed by Thomas Hitchcock, Secretary, and W. M. Laffan, Manager, (Exh. 7, p. 45). The earlier check was paid through the Clearing House April 2, 1898, and the later check May 16, 1898 (pp. 62–3).

Both these checks were paid out of the funds of the appellant *(Test.* Macdaniel, pp. 42–3*)*, and both were entered in the cash book and journal, and thence, included with other items relating to expenses connected with the Spanish war, were carried into the ledger, *(Test.* Macdaniel, pp. 47–50*)*.

The cash book entry in regard to the earlier check was made under the heading "Editorial Expense" and reads: "Yacht *Kanapaha*, 5,000" (p. 49). The cash book entry of the later check reads: "Editorial Expense; Yacht *Kanapaha* $10,000." (p. 50).

The journal entry of the earlier check is: "Yacht *Kanapaha*, 5,000" (p. 47), and of the later check: "Charter *Kanapaha* to October 1, $10,000." (p. 69).

They were carried into the ledger under the head "Editorial Expense" (pp. 49–50).

IX. After the charter at the request of the appellant the firm of Chubb & Sons, Marine Underwriters, in the City of New York, effected insurance on the *Kanapaha*, to the amount of £12,000. for two months from April 2, 1898 (*Test.* Percy Chubb, p. 176 *et seq.*; Sidney Chubb, p. 147 *et seq.*) The insurance was continued for the same amount from June 2, to August 2, and afterwards for one month from August 2 to September 2 (147–8); and was then suffered to lapse.

The bills dated April 23, June 11, and July 30 were made out to the Sun Printing and Publishing Association (Exhs. 8, 9, 10, pp. 255–6). These bills were paid respectively June 1, July 12 (by Manager Laffan's check No. 39,812) and August 16 (by Manager Laffan's check No. 40,423).

The receipted bills were produced by the appellant's Cashier, Macdaniel, (p. 52), who also produced and exhibited the entries of the several payments in the *Sun's* books of account kept by him (pp. 51–53).

X. From the time the yacht was chartered until she was wrecked, she was in the service of the *Sun* as a despatch boat, under the management of reporters of the *Sun:* first, Anderson, then Spears and, finally, Chamberlin, who were employed in obtaining and transmitting to the *Sun* news of the operations of the fleets and armies engaged in the war in Cuba.

Anderson took charge of the boat on the day she sailed from New York, and remained until the latter part of July. Spears went on board at Key West about April 20, and remained until the latter part of May (*Test.* Anderson, pp. 75–6). When Spears came on board he superseded Anderson in control, and directed the movements of the boat (p. 77). On his departure Anderson was again in control until Cham-

berlin came (pp. 77–8), and Chamberlin held the control from his arrival about the middle of June until the boat was wrecked (*Test.* Chamberlin, p. 162).

XI. It is admitted that during the whole of the period covered by the charter until the loss of the yacht all her expenses were paid by the *Sun* (p. 58). The funds were disbursed by the reporters from time to time in charge while she remained afloat, and after the wreck Captain Atkinson (who had succeeded Captain Packard) received some money in New Orleans from the *Times-Democrat*, at the request of the *Sun*, and was finally paid off at the *Sun* office by the cashier (*Test.* Atkinson, pp. 115–118; Anderson, pp. 78–9; Chamberlin, pp. 161–2).

During the whole period representatives of other newspapers were from time to time carried on the *Kanapaha*, for whose accommodation the *Sun* received payment (*Test.* Harper, p. 152; Lee, p. 172; Wardman, p. 179; Paine, p. 150: Anderson, pp. 78–9; Macdaniel, pp. 58–9).

XII. Mr. Lord, by whom the charters were executed, was Managing Editor of the *Sun*, and had entire control of all arrangements connected with getting news. Neither Mr. Dana, the Editor in Chief of the paper and the president of the corporation, nor the Board of Trustees, nor any officer or trustee of the company ever interfered in the management of this part of the business (*Test.* Dana, pp. 232–41; Macdaniel, p. 245; Bartlett, pp. 248–9; Hitchcock, pp. 157, 158).

Lord had been in the service of the *Sun* in the same capacity for twenty years, and is still in its service (*Test.* Dana, pp. 237-244).

XIII. The *Kanapaha* was wrecked and became a total loss September 5, 1898, while bound from Ponce, Porto Rico, to Havanna by way of the old Bahama Channel, by striking a reef two miles off the north

coast of Cuba at a point six or seven miles east of the entrance to Nuevitas Harbor, at about a quarter before eight o'clock in the evening. The sun had set about half-past six, and at the time of the stranding it was quite dark, though the night was fine and clear. The sea was smooth, and there was a light air from the northeast (*Test.* Gaspar, pp. 25, 26, 86, 87; Atkinson, pp. 103, 104). The yacht was proceeding at the rate of about twelve knots an hour (*Ib.* p. 99). She left Ponce on August 30, or September 1, and stopped for coal at the Port of Cape Haitien, and left that port on the evening of September 3 (Atkinson, p. 98). About eight A. M. on the morning of the 5th land west of Cape Lucretia was sighted 30 or 40 miles distant, and the Cape itself was passed at a distance of about six miles towards the middle of the day (*Test.* Atkinson, pp. 98, 100, 219, 224, 225, 226). At eight A. M. the course was set west by north three-quarters north (p. 219), which was continued until five o'clock in the afternoon, when it was changed to northwest by north (p. 219).

At that time the yacht was supposed by the master to be 25 or 30 miles east of Maternillos Point (pp. 221-3). If his estimate of his position be correct it would appear from the chart that the ship was then somewhat east of Point Manati.

Nuevas Grandes, as shown upon the chart, lies about seven miles northwest of Point Manati. From Nuevas Grandes to the eastern point of the entrance to Nuevitas Harbor is 12 to 15 miles (*Test.* Knight, p. 188). This point is called East Point: the western point of the harbor is Maternillos.

A reef runs along the coast between Nuevas Grandes and the mouth of Nuevitas Harbor (*Test.* Knight, pp. 188, 189). It is well known to navigators (*Ib.* pp. 189, 190). Although not fully delineated on the United States charts, it is shown on the British Admiralty charts (Exh. 16, p. 189; *Test.* Atkinson, p. 127), and is described in the Sailing Directions issued

by the Hydrographic Office of the United States as follows: "Port Nuevitas del Principe. From Nuevas Grandes the coast takes a northwest direction for 13 miles to Nuevitas del Principe, is skirted by a reef *all the way*, and should not be approached within two and a half miles. (Caribbean Sea and West India Islands, Vol. 1, pp. 126, 127; pp. 195-7). The reef is from half a mile to a mile and three-quarters or two miles off shore *(Test.* Knight, p. 188*)*.

The old Bahama Channel current, branching off from the Equatorial current, divides at the east end of Cuba, part of it passing to the south of the Island and the other part of it along the north coast. This north coast current becomes perceptible off Cape Lucretia. It flows at the rate of half a knot to two knots an hour, varying with the situation and with the changes of the moon. Off Point Nuevitas del Principe it sets in shore in a direction south or south-southwest, and in the vicinity of this Point navigators make a practice of allowing for it two knots an hour *(Test.* Knight, pp. 190-1*)*. This current is well known to navigators, and, like the reef, is described in the United States Sailing Directions, before referred to, in the following terms: "On the north coast of Cuba as far west as Matanzas the current almost always sets to the westward with a force varying from ½ knot to 3 and even at times 4 knots. This westerly current is felt, but with less constancy on the eastern side of the Bahama Banks and Islands, and is due partly to the constant trade wind acting on the surface of the sea and is partly a continuation of the great equatorial current which is deflected to the N. W. by the coast of South America and moves swiftly and steadily through the passage between the Islands of Trinidad and Granada. Though not invariable, the experienced navigator should vigilantly guard against the effects of this probable current by *never losing an opportunity by night or day of verifying his position.*" (Sailing Directions, *supra*, p. 5; pp. 205-6*)*.

Though the coast line of the north shore of this part of Cuba lies low, it is visible east of Nuevas Grandes at a distance of 12 miles off shore, from an elevation 14 feet above the water *(Test.* Knight, 192-3*)*, which was the elevation of the bridge of the *Kanapaha (Test.* Lewis, pp. 189–90*)*.

Captain Atkinson, who was in command of the vessel, testifies that he was familiar with that part of the coast (p. 103), and had traded several years on the north side of Cuba (p. 112).

The vessel having passed Cape Lucretia, as before stated, toward the middle of the day, the captain ascertained his latitude by observation, but did not take the longitude *(Test.* Atkinson, 127-8*)*. The compasses were correct (pp. 100, 128). The yacht was sailing all day about 12 knots an hour *(Test.* Atkinson, p. 120*)*. *The captain did not take his bearings at any time during the afternoon.* He testifies that he ascertained his position and his distance off shore by the course steered and the distance logged (pp. 127–8) —that is to say, by dead reckoning.

Continuing the same course, at five P. M. he supposed himself to be 25 or 30 miles to the eastward of Maternillos Point, on which is the light at the westerly point of Nuevitas Harbor (pp. 221–2), and from the position in which he then supposed himself to be expected to pass the Maternillos Point light, steering a course northwest by north, at a distance of six miles from the shore, a course which, if his position had been what he supposed, would have carried him directly into the old Bahama Channel (pp. 221, 100, 219). He expected to make Maternillos Point light at six o'clock (pp. 203, 198–9).

The sun set between quarter and half-past six, and ten or fifteen minutes later it became dark (p. 122). At that time he supposed himself about six miles off shore (p. 125).

He had not made the lights at Nuevitas Harbor up to the time of the stranding of the vessel. In point of

fact the lamps of the Maternillos light and the Eastern Point light had been destroyed by the Spaniards during the war and had not yet been replaced, so that no lights were burning there on that night (Atkinson, pp. 102–3, 125 ; Chamberlin, p. 166).

About 7:45 P. M.—the assistant engineer, Gaspar, says it was 12 minutes to 8 (p. 36)—the yacht stranded on a reef about two miles off shore and about six or seven miles east of the entrance to Nuevitas Harbor (Atkinson, pp. 103–4, 126, 217). The night was dark, but very fine for seeing a light, without fog (Atkinson, p. 103 ; Chamberlin, p. 166). At the time of the wreck three persons were standing on the bridge with glasses trying to make out the lights which they had been expecting to see for nearly two hours past (Chamberlin, p. 167 ; Atkinson, pp. 221–2, 217). The captain was on deck, though not on the bridge *(Ibid)*. The surface of the sea was perfectly smooth, as smooth as a floor (pp. 103–4) ; and there was nothing on the water to indicate the presence of the reef *(Ib)*.

At the time the ship struck, the Norwegian steamer *Albus*, bound from New York to Nuevitas, was following in the wake of the *Kanapaha* at a distance which the captain estimates at one mile, and Chamberlin, who was on the bridge when the ship struck, at five to ten miles (p. 167). The captain put out a boat and pulled towards her for the purpose of warning her to change her course and telling them that his ship was ashore (Atkinson, pp. 105–6), and to ask the Norwegian to stand by until morning (Chamberlin, p. 168). Two hours and a half or three hours after the stranding all went ashore from the yacht (Chamberlin, p. 169). The next day the sea was too rough to go on board the yacht, but the day after Atkinson and Chamberlin went aboard (Atkinson, pp. 127–8 ; Chamberlin, pp. 169–70).

The log and charts were lost (Atkinson, p. 225). No reason is given why at least the log was not rescued by the captain either when he left the yacht the night she struck, or on his return the second day after.

The result of these details is that the stranding of the vessel was due to her being 4 miles out of the position where the master supposed her to be; and this mistake is attributed by him to the absence of the lights he expected to see; to the current, of which he says he was ignorant; and to the imperfection of his chart in not indicating the reef at the point at which the vessel struck (Atkinson, pp. 100–1).

Neither of these excuses is valid, as will be shown more at large in the Points following; and the result is that the loss of the vessel was due solely to the negligence of those who were in charge of her.

XIV. In the District Court it was held by BROWN, J., that the charter was the contract of the appellant and not of Lord; that the appellant was liable for its failure to return the yacht to the owner on the expiration of the charter, October 1, 1898; that the measure of damages was the stipulated value of the yacht at the beginning of the charter, $75,000, less the hire, $10,000, paid on the execution of the charter. The Court deducted the hire on the theory that as the liability of the charterer was limited by the stipulations of the agreement of suretyship to $75,000, this liability was in part for the payment of the hire, and was diminished *pro tanto* by such payment (Opinion, p. 262).

The Circuit Court of Appeals held, in the opinion delivered by WALLACE, C. J., that the appellant was the charterer, and adopted the reasoning of BROWN, J., in the District Court on that point; that the destruction of the vessel during the charter period did not discharge the appellant's express covenants assuming responsibility for all loss and damage to the vessel and stipulating to return her at the end of the term; that the stipulation as to value was intended to fix her value in case of injury or destruction as the basis of damages, and that the clause limiting appellant's liability to $75,000 did not operate to deduct the $10,000 charter hire paid in advance from the damages caused by

failure to perform the stipulation to return (Opinion, p. 278).

First Point.

The charter parties and the so-called agreements of suretyship are the contract of the Sun Printing and Publishing Association, the appellant.

I. They are so in form.

1. In the agreements of suretyship (pp. 16, 257), the *Sun* is expressly named as the contracting party in the body of the instrument; they are signed by Chester S. Lord "for Sun Printing and Publishing Association," and he, described as Managing Editor, acknowledged that he executed the same "for and on behalf of his firm, under authority of said company as its act and deed."

The certificate of acknowledgment (p. 17) was executed by Bradley, a notary, who was also Advertising Manager of the *Sun*.

Test. Bradley, pp. 174–5.

This instrument plainly purports on its face to be the contract of the *Sun*.

2. In the charter party of May 14 (p. 15), as well as in the earlier charter of April 1 (p. 14), Lord, without further description, is named as hirer in the body of instrument; but the signature is, "Chester S. Lord, for the Sun Printing and Publishing Association."

Such a signature shows that he did not sign it for himself, and that he did sign it for the company: and thus signed the instrument becomes the act and agreement of the party for whom it was signed, supposing,

of course, that the agent had authority thus to contract for the principal.

Prentice v. U. S. Steamship Co., 58 F. R., 702.
Alexander v. Sizer, L. R. 4, Exch. 102.
Hill v. Miller, 76 N. Y., 32.
Tucker Mfg. Co. v. Fairbanks, 98 Mass., 105.

3. If the obligation of the charter party were ambiguous in the absence of surrounding circumstances tending to show whether it was the contract of Lord or the contract of the *Sun*, the agreements of suretyship obviate any doubt. Those agreements speak of the charter party as "hereunto annexed, and hereby made part hereof," and declare "the intention of this understanding being to hold us primarily liable under the terms of the annexed agreement."

This gives a construction to the charter parter, by declaring the meaning and intention of the parties. It is not a mere guarantee of performance by Lord, but is an interpretation of the charter and declares that the *Sun* is primarily liable thereunder. If the charter were Lord's contract he would be primarily liable; if it were not his contract the *Sun* would be primarily liable; and this interpreting agreement by declaring the primary liability of the *Sun*, shows that the charter is the *Sun's* contract.

4. It is immaterial that the obligations of the principal are expressed in two instruments rather than one: in the charter party, and in the interpreting agreement, or agreement of suretyship, by which the primary liability under the charter party is expressed to be assumed by the principal.

If the agent had authority to bind the respondent by a charter party, he could make the contract in his own name for its benefit, and execute an instrument by which his principal made itself responsible for the performance of the terms of the charter.

Arnot v Erie R. Co. 67 N. Y. 315.
Green Bay &c R. Co v Union Steamb. Co. 107 U. S. 98.

II. If regard be paid to the situation and the intention of the parties it is clear that the charters are the contract of the *Sun*, and not of Lord individually.

1. It is well settled that such evidence is competent, the instrument not being under seal.

Mechanics Bank v. Bank of Columbia, 5 Wheat. 526.
Whitney v. Wyman, 101 U. S. 392
Metcalf v. Williams, 104 U. S. 93
Hitchcock v. Buchanan, 105 U. S. 416
Pearson v. Post, 108 U. S. 418.
Woodhouse v. Duncan, 106 N. Y. 527, 531.
Story, Agency, §§ 160*a*, 270.

2. Where an agent's principal is known the presumption is that the agent contracted in his behalf; and if the principal claim that the other party dealt with the agent as principal, and not in his quality of agent, he assumes the burden of establishing this by clear proof.

Meeker v. Claghorn, 44 N. Y. 349.
Butler v. Evening Mail Ass'n, 61 N. Y. 634.

3. The testimony shows that Lord was, and was known to be, agent for the *Sun*, and it does not appear that either he or the owner regarded the transaction as that of Lord, and not as that of the *Sun*.

(a) The yacht was first chartered April 1, by a charter party in which Lord was named as Hirer, but signed by him "Chester S. Lord for the Sun Printing and Publishing Company" (p. 14). By the supplementary agreement of April 1 the *Sun* assumed responsibility as hirer (p. 257). In the second charter party the first is referred to in the following terms: "The Hirer will carry out the provisions of the charter party made on the first day of April last."

The effect of the supplementary agreement of May 14, Exhibit C (p. 76), was to make the *Sun* in terms primarily liable for the performance of this engagement.

The first charter party was negotiated by Chamberlin, a reporter for the *Sun* (*Test.* Chamberlin, pp. 159–

60), with the co-operation of Capt. Packard, who commanded the yacht for about two months (*Test.* Packard, p. 178) Packard was summoned from New Brunswick by a messenger who asked him to report at the *Sun* office. He went there, and talked with Chamberlin and with Anderson another reporter in the service of the paper (*Test.* Anderson, pp. 75-6); and these two reporters made an appointment for him to meet Manning, the yacht broker, who subsequently executed the papers as agent for the owner.

After futile efforts to obtain a yacht called *Vamoose*, Captain Packard recommended the *Kanapaha* and two or three other yachts as suitable for the business of running despatches during the war (pp. 181-2). The *Kanapaha* was engaged, and was chartered for two months for $5,000 by a charter party which provided that the charter money should be payable on the signing of the agreement. In accordance with this provision Manning received a check for $5,000 dated April 2, 1898, payable to his order, and signed "W. M. Laffan, Manager, pr. L. O. Macdaniel." The check bore in the margin the name "*The Sun*". (Exh. 6, p. 44). It was drawn by Macdaniel, the Cashier for the *Sun* (*Test.* Macdaniel, pp. 42-43), and delivered by him to Mr. Lord (p. 45). It was received by Manning on the same day and deposited by his clerk on the same day to Manning's credit (*Test.* St. Johnston, pp. 131-2). The stamp on the check shows that it was paid through the Clearing House (p. 44).

The yacht having meanwhile been docked, provisioned and coaled, was put in commission, and sailed under the command of Captain Packard and in charge of Mr. Anderson, a reporter for the *Sun*, on the evening of April 2 or 3. (*Test.* Anderson, p. 75; Packard, p. 180; Petersen, pp. 31-33).

(b). The second charter party, as already stated, was made May 14, and at that time the boat was still under the first charter and was in the service of the *Sun* in Cuban waters. Anderson was still on board, but the

yacht was then in charge of Mr. Spears, another reporter, who took charge about the 20th of April and retained it until the latter part of July, when he was superseded in the command by Mr. Chamberland (*Test.* Anderson, pp. 75, 76, 77, 78).

(c). It does not appear from the record who negotiated the charter party of May 14 on behalf of the *Sun*, but the charter provided that the hire of the yacht for the four months from June 1 to October 1, $10,000, was payable on the signing of the agreement. Accordingly, on the same day a check of the *Sun* for $10,000, dated May 14, payable to the order of Thomas Manning and signed by Thomas Hitchcock, Secretary, and W. M. Laffan, Manager (Exh. 7, p. 45) and not drawn by Macdaniel but by some other person (*Test.* Macdaniel, pp. 45–6) was received at Manning's office and deposited by his clerk, St. Johnston, to his credit May 16 (*Test.* St, Johnston, pp. 131-2) and, like the first check, was paid through the Clearing House (p. 45).

(d). As against this contemporaneous evidence that Lord appeared to be acting on behalf of the *Sun* for the purpose of procuring a vessel to be used to gather news for the use of the paper, there is no evidence whatever to show that either he or the owner believed or suspected that Lord was acting in his own behalf in making the contract for the charter of the yacht rather than in behalf of his principal in whose business it was to be employed.

4. The yacht having been thus chartered, the appellant admits that it put her in commission, made such repairs as were necessary to that end, and furnished all necessary provisions, coal and other supplies (*Answer*, p. 11); that the yacht was used for the purpose of enabling the representatives of the appellant, and also the representatives of other newspapers, to observe the naval and military operations in the vicinity of the Island of Cuba (p. 12); that Anderson, Spears and Chamberlin were employed by the appel-

lant as reporters on the yacht from April 2 to September 5, 1898, and that their duties were to transmit news for the use of the paper (p. 19).

It was admitted on the trial that the appellant paid all the running expenses of the yacht from the making of the second charter party to the time of the loss, including the wages of the captain, Atkinson, who was in command during that period (p. 58).

The testimony further shows that the yacht was insured for account of the appellant through Chubb & Son, marine underwriters, at the request of the *Sun*, and that the premiums were paid by the appellant and charged up in its books kept in its office *(Test.* Macdaniel, pp. 50–53; Percy Chubb, pp. 176–9; Sidney Chubb, pp. 146–50*)*. The insurance was for £12,000 and expired September 2 (pp. 146–7). It was taken out, according to the English practice, in the name of C. T. Bowring & Co., Insurance Brokers and Ship Agents in London, who are the correspondents of Chubb & Son (pp. 147–8).

Many details of the payment of the expenses of the ship, crew and reporters by the respondent are disclosed by the record (Test. Anderson, pp. 79, 80; Chamberlin, pp. 161–2; Packard, pp. 163–4; Atkinson, pp. 115–116, 115–118).

SECOND. Lord had authority to make the contracts in suit.

I. The appellant's charter and by-laws are consistent with the authority he exercised.

1. The appellant is a corporation organized under the Manufacturing Corporation Law of 1848 of the State of New York. The certificate of organization, executed September 27, 1867, and filed September 30, 1867, in the Office of the Secretary of State, is in evidence (p. 328).

Originally incorporated by the name of "The Evening Telegraph Association", the name was changed by Act of the Legislature, passed January 24, 1868, to

"Sun Printing and Publishing Association" (Exh. 2, p. 331).

The objects for which the company is formed are described in the organization certificate as "the printing and publishing of a daily newspaper in the City of New York, and generally the business of printing and publishing books, pamphlets and newspapers."

The certificate contains no definition of or restriction upon the powers of the trustees, officers or agents of the Company.

2. The by-laws are in evidence (Exh. A., p. 260), and contain no definition of the powers of the trustees or of any officer or agent of the Association; and the only restriction upon the powers of the trustees is that they shall not sell or alienate the title and good will of the *Sun*, nor sell the real estate belonging to the Association, without first calling a meeting of the stockholders and obtaining the consent of the holders of two-thirds of the whole stock.

The only duties prescribed in respect to any of the officers are that the President and Secretary shall sign all certificates of stock and make all transfers of the same on the books of the Association.

Provision is made for two standing committees of the board of trustees—namely, an executive committee and an examining committee. The duties of the executive committee were to have the supervision of all the property of the Association contained in their building and of the building itself. It was made the duty of the examining committee to examine the accounts of the Association and to inquire into both the receipts and disbursements of money, and to report to the trustees at each regular meeting (Article VII., p. 261).

The by-laws were amended June 28, 1898, a date at which the *Kanapaha* was in the service of the appellant, by leaving out all provisions relating to executive and examining committees (Amended By-Laws, Exh. 13, p. 341).

II. It is not shown that in making the contracts in suit Mr. Lord had usurped authority which had been restricted to the board of trustees, or to any other officer or agent of the company.

At the time the charters were executed there were only four trustees—Paul Dana, who was also the President of the Association; Thomas Hitchcock, Secretary; William M. Laffan; and Franklin Bartlett (Ans. to Third Interrogatory, p. 18). Edward P. Mitchell, who is named in the answer as a trustee, was not elected until May 23, 1898 (*Test.* Dana, p. 229).

1. Mr. Dana, in addition to being President of the corporation, is the Editor-in-chief of the paper (Test. Dana, p. 230). His particular work is to direct the political policy of the paper and from time to time to write editorials; but with the active management of the paper, in connection with getting news and the publication of it, he concerns himself only to a very slight degree (pp. 235–6). He does not attempt to go into the details of the work of the editorial department in charge of the Managing Editor (p. 234).

2. Mr. Hitchcock, the Secretary of the Board, has charge of the financial department of the paper and confines himself to that department, and to the writing of the Monday morning financial article and occasional editorials on financial subjects. He does not concern himself with the means taken by the editorial department to acquire news, and he had no occasion to acquaint himself with what was being done by the *Sun* in connection with the Spanish War. He knew that boats were used by the *Sun* during the war, but he says he did not know their names or how many there were or who had obtained them (*Test.* Hitchcock, pp. 157, 158).

3. Mr. Laffan, the Business Manager, was not called as a witness, and sailed for Europe April 22, while the trial, which began April 14 (p. 22), was in progress (p. 229). He manages particularly the financial or business part of the office (p. 145). His powers and

duties are not shown to affect the questions in this suit, beyond the fact that a bank account of the respondent is kept in his name, on which checks are drawn at Lord's request (pp. 42, 45, 69, 70), and the fact, already adverted to, that he signed the check given in payment of the charter money.

4. Mr. Bartlett is counsel for the *Sun* and takes no active part in its business management except to give his opinion on instruments in writing to be executed by the corporation which are submitted to him, to attend to its law business, and to attend the meetings of the Board of Trustees, and vote on such qusstions as come up for decision (Test. Bartlett, p. 248).

5. Mr. Mitchell also was called as a witness. He was not a trustee at the time either of the charters was executed but was elected May 23, 1898, nine days after the execution of the second charter (p. 229).

III. Mr. Lord's authority is neither expressed in nor restricted by the by-laws of the association, nor by any resolutions or other formal acts either of the trustees or of the stockholders. It is, therefore to be inferred from the course of the business and from the things he was required or permitted to do in the performance of the work in which he was engaged.

1. The same remark applies equally to all the officers and employees of the company. Without exception their powers and authority are to be found in following the same line of inquiry.

2. In the appellant's answer to the fifth interrogatory, annexed to the libel, Lord's duties are described as follows: "A general oversight over the news columns of the papers. He hired some of the reporters and signed some of the payrolls. His particular functions were to see to the making of the paper over night. Such duties are not defined in the By-Laws of the Board of Trustees or in writing. The powers and duties of the said Lord for the purpose of procuring news and information for publication in said newspaper were to make arrangements throughout the

United States with local agents for furnishing and transmitting news. He also had the power to buy items of news from any source; and he had some latitude in hiring reporters, but such action was subject to confirmation by the Editor-in-chief." (p. 18).

There is no attempt to show by the evidence that his authority was limited to the particulars mentioned in this answer: on the contrary the evidence shows that his duties and powers were much more extensive than the answer admits.

3. The business of the *Sun* is divided into two general departments, the editorial department and the publishing department; Mr. Lord being in charge of the editorial department with the title of Managing Editor, and Mr. Laffan in charge of the publishing department as the Business Manager *(Test.* Dana, pp. 240–1*)*.

4. The matter of obtaining news is under the charge of the Managing Editor (p. 241). Disbursements connected with his department are made upon his order.

The Cashier has general instructions to honor his orders in writing *(Test.* Macdaniel, p. 245*)*, and the practice is that when oral instructions are given by Mr. Lord in regard to the disbursement of money the Cashier himself writes Lord's name on the bills authorizing their payment (pp. 245–6).

No trustee is specially designated to overlook the financial matters of the paper, which are in general charge of the bookkeeper Macdaniel *(Test.* Dana, pp. 234–5; Macdaniel, pp. 247–8).

In all matters that relate to editorial expenses the bookkeeping is under Lord's control *(Test.* Dana, pp. 234–5*)*.

4. His authority is such that in all matters connected with his department he acts without resorting either to the Board of Trustees or to the president (whose office is only two rooms from his own) or to any other officer or agent of the Company.

In particular his authority is conceded to have been thus absolute and sufficient with regard to procuring information or news for publication relative to the war in Cuba, with regard to the sending of reporters or other employees to obtain such news or information, and with regard to the employment of such suitable and requisite means as might be necessary to enable the reporters and other employees to procure such news or information (Sixth Interrogatory, p. 6, and Answer thereto, p. 18). No authority from trustees or officers was required for these purposes, because without any instructions or directions from any other source, as Mr. Dana testifies, Lord had charge of all details connected with such matters *(Test.* Dana, pp. 232–3*)*.

5. The authority which Lord had and exercised with regard to obtaining news about the Spanish war was not peculiar to that occasion, but was only an incident of his general authority.

No one else interferred in such matters, or concerned himself in any way, or to any extent, with getting news, or the means to be employed for that purpose. No one else appears to have authority to do so.

The Editor-in-chief expressly disclaims any concern about such details as to where reporters should go, and what means should be taken to get information. He did not in any way concern himself with the details in connection with the use of despatch boats by the *Sun* for getting information; and the reason why he did so was, as he says, because Mr. Lord had charge of all that *(Ib.*, pp. 232–3*)*. He is careful not to place any limitations upon the extent of Lord's authority in such matters.

6. At the same time that Mr. Dana thought it unnecessary to enquire about details, he knew very well the broad fact that Mr. Lord was getting news in regard to the Spanish War, and knew that Lord made the arrangements for getting it, because he testifies that from time to time he asked Lord if his arrange-

ments were satisfactory, or some general question of that sort; but he adds that the arrangements were left to Lord, and it was understood by himself and by the other trustees that if the arrangements were satisfactory to Lord they were also satisfactory to them *(Ib.*, pp. 233–4*)*.

7. To hire boats when they are wanted is expressly admitted by Mr. Dana to be in accordance with the appellant's course of business, and within the power of Mr. Lord. He said (p. 237):

"Q. I suppose that whenever a boat would be desirable to get news you would expect a boat to be obtained? A. Yes.

"Q. And that would be just as much a part of Mr. Lord's duties as to send a reporter to get information of some events in town? A. Yes."

This would appear to be conclusive.

IV. As the whole management of the editorial department of the paper, which included the collection of news, was left by the company in Lord's charge; and, as he had authority to make such arrangements as he thought fit, not only to obtain news in general, and also, and in particular, about the war in Cuba; he had, as a necessary incident to this authority, the power to make contracts in furtherance of the purposes it was his duty to accomplish and for which his authority existed; and any contracts so made by him are binding on the appellant.

Story, Agency, §§ 58, 85, 97.
Mechem, Agency, §§ 280–311.
Nelson vs. H. R. R. Co., 48 N. Y., 498.
Meehan vs. Forrester, 52 N. Y., 277.
Hardee vs. Hall, 12 Bush (Ky.), 327.
Prentice vs. Steamship Co., 58 Fed. R., 702.

V. The evidence to which reference has now been made shows that Lord was the general managing agent of the respondent for the purpose of obtaining and publishing news.

1. In such a case, where a contract is made by any agent of a corporation in its behalf, and the corporation receives the benefit of the contract without objection, it may be presumed to have authorized or ratified the act of the agent.

Railway Companies vs. Keokuk Bridge Co., 131 U. S., 371, 381.

2. In such a case, also, the burden of showing that any particular contract in the general line of the agent's duty was not within his actual authority is upon the principal; and in the case at bar the appellant has failed to show that Lord had not in reality the authority he assumed to exercise.

Patterson vs. Robinson, 116 N. Y., 193.
Holmes vs. Willard, 125, *Id.*, 75.
Hastings vs. Brooklyn Life Ins. Co., 138 N. Y., 473.
Oakes vs. Cattaraugus Water Co., 143 N. Y., 430.

VI. The appellant's attitude towards Lord since it repudiated the contracts in suit tends to support the findings of the Court below that he had authority to make them. If he had really transcended his authority, it was a conspicuous breach of the confidence which for 20 years his principals had reposed in him, and might naturally have been followed by his dismissal from their service; yet he was not dismissed; he is still managing editor; and, although the by-laws were amended after the second charter was made, and when every one knew that this and other vessels had been hired by him on some terms or other, and were actually in the service of the *Sun*, gathering war news, no fresh limitations were then or otherwise placed upon his authority. On the contrary, by dispensing with the Executive Committee and the Examining Committee, and by not altering the practice of the Board in holding monthly meetings of the most formal character, the method of doing business which left

Lord free to do as he thought best in all matters relating to getting news, seems to have had the deliberate approval of the corporation.

Mr. Lord would not have been a hostile witness for his principal. If he had intended to bind himself by the charters, and not the appellant, he would have said so. If, on the other hand, he had intended, as the owner understood, to bind the company, and not himself, he would have incurred no personal liability if it turned out that he had exceeded his authority, and he might safely have said so, if such were the truth. The omission of the appellant to call him as a witness warranted the Court below in drawing such inferences as to his authority as the evidence in the record, corroborated by his silence, will support.

THIRD. Though other proofs failed to show that Lord had had express antecedent authority to charter the *Kanapaha*, still the actual knowledge of at least three of the trustees that she had been hired, the notice to all of them and to the corporation involved in the numerous entries in the books, the use of her in the respondent's business, the payment of her charter money and running expenses, the letting of some of her accommodation for hire to other newspapers, and the published admissions in the *Sun* that she was in its service under charter, prove that the appellant knew what Lord had done, and acquiesced in it; and consequently the appellant is bound by the contract he made.

Eureka Co. vs. Bailey Co., 11 Wall, 488.
Mining Company vs. Anglo-Californian Bank, 104 U. S., 192.
Railway Companies vs. Keokuk Bridge Co., 131 U. S., 371.
Jacksonville, etc., Ry. Co. vs. Hooper, 160 U. S., 514.
Scott vs. Middletown, etc., R. R. Co., 86 N. Y., 200.
Phillips vs. Campbell, 43 N. Y., 271.
Moss vs. Rossie Lead Mining Co., 5 Hill, 137.

I. The trustees knew that Lord had hired the yacht.

1. Mr. Dana knew that the *Sun* was using dispatch boats and employing its reporters to get news of the progress of events in Cuban waters. He saw it in the paper, and from time to time talked with Lord about it. He says he heard from Lord about the *Kanapaha*, and he thinks he has heard reporters speak of it. He also knew that the *Sun* was using a boat of the name of *Premier* (pp. 231-2). He says he did not know of the use of a boat called the *Carbonaro* (p. 232), although both the *Premier* and the *Carbonaro* were under the charge of the witness Chamberlin, just as the *Kanapaha* was *(Test.* Chamberlin, pp. 163-4*)*.

Dana's knowledge was notice to the corporation.

Bank of U. S. vs. Davis, 2 Hill, 451.

2. Mr. Hitchcock, indeed, says he knew nothing about it (pp. 157-8); but he admits that he knew the *Sun* was using despatch boats during the war for purposes of observation (p. 157), though he did not know their names (p. 157-8); and in regard to the *Kanapaha* his memory is evidently at fault, because he signed the check for $10,000. in payment of the charter money under the charter in suit (p. 45, 46).

3. Mr. Laffan was not called as a witness, and therefore he may be presumed to have known it. The presumption is strengthened by the fact that he also signed with Hitchcock the $10,000. check *(ibid)*; and becomes conclusive in connection with the fact, admitted by the answer, that he made arrangements for the accommodation of reporters for other papers on the yacht (p. 19).

II. All the expenses of the *Kanapaha* are admitted to have been paid by the respondent (p. 58); and so by the terms of the charter, as explained by the supplemental agreement, it was bound to do.

III. Payments on account of the *Kanapaha*, as well as all other expenses connected with the Spanish War were entered under a special account called the

"Spanish War Account" (*Test.* Macdaniel, pp. 52, 54, 55–6), the balance of which at the close of the war was finally charged up to the Editorial Expense account (*Test.* Macdaniel, p. 55, 64–66). All matters appertaining to getting news as to the War were treated as ordinary accounts in accordance with the ordinary course of business, and were left to Mr. Lord's department (p. 235).

The expenses connected with the *Kanapaha*, being properly entered in the books of the *Sun* were audited by the auditor from time to time; and every month at at the meeting of the Board a report was made to the effect that the books were examined and were found to be correct. The method of bookkeeping is described in great detail by the witness Macdaniel and reference has been made to it heretofore. In substance, it appears that payments in the first instance were entered in the cash book, then transferred to the journal and then, with other items under the same head, under the title of Spanish War Account were transferred to the ledger. It is shown that a number of the entries distinctly mentioned the *Kanapaha* (*Test.* Macdaniel, pp. 47–66); and the entry of the payment of $10,000. under the charter in suit distinctly mentions the charter. It reads: "May 17 Charter *Kanapaha* to October 1, $10,000." (p. 50).

1. The entries in the respondent's books and the examination and approval of the accounts from time to time by the auditors and by the Board, charge the appellant with knowledge of the charter; and, by not repudiating it, the appellant adopted and ratified it.

Martin v Webb, 110 U. S. 7.
Hyatt v Clark, 118 N. Y. 563
Fifth National Bank v Navassa Phosphate Co. 119 N. Y. 256
Hanover National Bank v American Dock and Trust Co. 148 N. Y. 612

2. What the trustees are presumed to have known

they are held to approve if they do not promptly express dissent.

Gold Mining Co v National Bank, 96 U S 640
Indianapolis Rolling Mill vs St Louis etc R R Co. 120 U S 256

IV. So also the appellant provided accommodation for reporters of other papers on board the yacht, and received payment for the accommodation furnished: from the *Press*, $1444.25; from *Harper's Weekly*, $500; from *Scribner's*, $1,000. *(Test.* Macdaniel, pp. 58–59*)*.

V. The appellant has publicly admitted in the columns of the *Sun* that the yacht had been chartered by it, saying: "The *Kanapaha* was chartered by the *Sun* before the outbreak of the war as a despatch boat" (p. 71).

Admissions in a newspaper are competent evidence against the proprietor.

Frye v Bennett, 4 Duer 247, 254; 28 N. Y. 324–330.
Malloy v Bennett, 15 Fed. R. 371, 374.
Huff v Bennett, 4 Sandf. 120, 130.

FOURTH. The considerations urged by the appellant do not rebut the proof either of Lord's antecedent authority, or of the ratification of what he did by his principal.

1. Stress was laid upon the absence of any resolution of the Board of Trustees empowering Lord to charter the yacht; but this is not important. The authority of an agent is not required by the law to be expressed in the minutes of the Board; the convincing evidence of it may be found in the course of business of the company, in the things he was permitted by the company to do, and in the conduct of the company with regard to the particular thing done by its agent in its behalf.

Bank of U. S. vs Dandridge, 12 Wheat. 64.
Eureka Company v Bailey Company 11 Wall. 488.

Jacksonville etc. R'y Co v Hooper, 160 U. S, 514.

2. If it be true that the employment of the *Kanopaha* was never directly brought before the Board of Trustees pp. 228, 156); the same thing is true of the *Premier* and the *Carbonaro* which are conceded to have been employed by the *Sun* (pp. 164, 62, 142-3); but that its quite natural, for the reason that questions as to what should be done to get news never were brought before the Board, but were left to Mr. Lord *(Test.* Dana, pp. 238–9). The meetings of the Board were held once a month and were very short, not often longer than ten or fifteen minutes *(Ib.)*.

3. If it be also true that the Secretary, Mr. Hitchcock, on being asked by Mr. Lord to execute the first charter party on behalf of the Sun Association refused to do it, and also refused to execute the agreement of suretyship; nevertheless he testifies that the matter was never brought up in the Board of Trustees, and he does not say that he ever called the attention of any of the trustees to the subject, or objected to Lord executing the papers himself. So far as in him lay to approve the charter he did it by signing the check for payment of the charter money.

His refusal to executet the charter party was perfectly natural, because he had not been authorized to do so by the Board. As custodian of the corporate seal his authority to affix it to instruments appears to have been limited to such instruments as the Board of Trustees had approved and had directed to be executed *(Test.*, Hitchcock, pp. 154–5*)*.

But that Lord's authority to make contracts was not so limited is evident from the fact that Hitchcock, as well as Laffan, signed the checks for the payment of the charter money. It is fair to assame that neither of them would have done so unless Lord had authority to make the contracts.

FIFTH. The appellant having become the charterer of

the yacht, both through Lord's antecedent authority to make the charter and through subsequent ratification of what he did, all the engagements of the charter are binding, including the special covenants to put and keep the yacht in repair, to restore her at the expiration of the charter term, and to answer for any and all loss or damage to her.

I. As the hiring of the vessel has been ratified by the appellant, all the terms of the contract have been ratified; ratification cannot be partial.

Gaines v Miller, 111 U. S. 395.
Skinner v Dayton, 19 Johns. 513, 554.
Fowler v N. Y. Gold Exchange Bank, 67 N. Y. 138, 143.

II. Lord obtained possession of the vessel, in behalf of his principal, by means of the stipulations in the charter parties. Though he had not been authorized to make them, they are nevertheless binding upon the appellant because it accepted the vessel and kept it. In order to escape from the obligation of unauthorized stipulations made by an agent the principal must return the property. If not returned it is held by the principal subject to the conditions upon which it was obtained. *Qui sentit commodum sentire debet et onus.*

Wharton, Agency § 89.
Mundorff v. Wickersham, 63 Pa. St. 87.
Wheeler & Wilson Co. v Aughey, 144 *id.* 398.

Though the terms of the contract were not actually known to the principal, his ignorance will not diminish the effectiveness of his ratification if he keep the property.

Eadie v. Ashbaugh, 44 Ia., 519.

III. The appellant's contention that though it be liable as upon "an ordinary contract, express or implied, for the user of the yacht" (Appellants' Brief, p. 108), it is not liable upon the stipulations of the charter, is untenable.

1. Where there is an express contract, the law does not imply one, and, if the appellant is liable on any express contract, it is liable on the contract in suit, and on no other.

Hawkins vs. United States, 96 U. S., 689.

2. As no contract is implied where one is expressed, so the contention of the appellant is that Lord's contract is to be treated as though it had never been made. But, for reasons sufficiently stated already, that cannot be done. The appellant knew that some contract had been made, and acted accordingly. For instance, if the contract were merely implied, the appellant would not have paid the hire of the boat in advance, for the owner is not, in such a case, entitled to demand payment until the user has terminated. Neither would the appellant have paid the stipulated sums of $5,000 and $10,000 for her hire, because its liability would have been only for the reasonable value of the use, and the parties would have had to ascertain what that was.

3. If, then, there is an express contract, and the appellant is liable on it at all, it is liable on all its stipulations, for the contract is entire, and the appellant bound to perform all its provisions as the consideration upon which it has obtained the use of the vessel.

Steam Packet Co. vs. Sickles, 10 How., 419, 441.
Butler vs. Butler, 77 N. Y., 472.

4. As Lord is conceded by the testimony of Mr. Dana, to have had general authority to hire yachts when they were wanted and to arrange all details of the hiring (pp. 233–4, 236), he necessarily had power to enter into incidental engagements connected with the hiring.

Le Roy v. Beard, 8 How. 451.
Nelson v. H. R. R. R. Co., 48 N. Y. 498.

5. But authority to hire a vessel and to arrange all details certainly justifies an express engagement to return the vessel to the owners at the expiration of the charter term, because the law imposes this duty upon the hirer. If it be not fulfilled the law implies a further duty to pay her value; and this the agent may of course agree to. Whether or not this duty shall be subject to exceptions—whether the agent's engagement shall be more or less extensive than the law implies when nothing is said by the parties—is a detail. Is the agent to be silent on all details and leave everything to the law to arrange? If so, he does not arrange them. If he is to arrange them he must have authority to arrange them differently from the law, or his authority would be superfluous. So Lord, having the authority conceded by the appellant, had authority to assume for his principal the risk of being able to return the yacht, and to agree to return her at all events or else to pay for her. And that is what he did.

6. One object of the stipulation fixing the value of the vessel was to establish the amount the hirer would have to pay as equivalent for her return in case she were lost or destroyed, so that the engagement to return her could not be performed. If her value were ascertained he had just as much authority to assent to it as to any other matter of fact incident to the business. It involves no greater exercise of authority to stipulate in terms what the value is than to stipulate that she shall be valued at whatever she shall be ascertained to be worth.

7. The stipulations in question are not suggested to have been fraudulent.

They are not alleged in the answer nor shown by the proofs to be either unusual or unreasonable.

Their object is to relieve the owner of risk of losing his vessel by placing it upon the charterer. Whoever assumes the risk can secure himself by insurance; so that the practical question is in reality who shall insure the vessel, the owner or the charterer. When

the hirer assumes the risk of damage to the vessel, or of her loss whether partial or total, his engagement falls into the same category as the engagements to overhaul and repair, to pay pilotage, tonnage, light-house, port and other dues to protect against liens, to do nothing in contravention of law; for by neglect of any of these the owner is exposed to the risk of losing her.

It is not unreasonable that the hirer, who has possession and control of the vessel, should assume responsibility for her loss. If the hirer is not responsible, the owner is. But if she encounter perils of the seas or of enemies, it is the hirer who has brought her into danger for his own purposes; why is it not reasonable that he shall agree to be responsible?

If he take her away from her home port how is it unreasonable to agree to bring her back?

Should he keep her over the charter time he agrees to pay demurrage at the rate of $500 a day; and such a covenant is common enough. Why is it unreasonable to agree to pay her value if he never bring her back?

The value may be difficult for strangers to ascertain. If the parties can ascertain it to their own satisfaction, and agree about it in advance, why is it not reasonable to do so?

8. In *Le Roy v. Beard, supra*, reference was made to the acts of the parties to show the construction they placed on the agent's authority (p. 468). Applying the same test in the present case it appears the appellant understood that it had assumed the risks for which the charter stipulates. Immediately after chartering the vessel, and before she left port, the appellant caused her to be insured for £12,000, and continued the insurance when the second charter was made. The premiums were paid by checks of the company, and were entered in its accounts, which were examined by the auditor and approved by the Board of Trustees.

This indicated most clearly that the appellant considered itself answerable for the vessel's safe return; otherwise why should it have taken out insurance? It was not required by the charter to insure for the benefit of the owner, its own obligation having been accepted by him instead of insurance; and it did not do so, but made the insurance for its own benefit. The premiums amount to $3,850.32 (pp. 255–6): it is not credible that this money should have been expended unless the appellant intended to protect itself on its liability to answer for the safe return of the yacht.

This is a most unequivocal expression of an intention to assume, and to relieve the owner from, all risks that would be covered by an insurance of the vessel by the owner for his own benefit and at his own expense.

The Barnstable, 84 F. R., 895, 898; 94 F. R. 213.
Woolsey v Funke, 121 N. Y. 87, 92.

Second Point.

The loss of the *Kanapaha* under the circumstances disclosed by the record does not relieve the appellant from liability to return her to the owner, or to pay damages for not returning her.

First. Under the stipulations of the charter:

I. The Hirer stipulates that he "will surrender said yacht, with all its gear, furniture and tackle, at the expiration of this contract to the Owner or his Agent, at Manning's Basin, foot 26th Street, South Brooklyn, New York, in as good condition as at the start, fair wear and tear from reasonable and proper use only excepted, and free and clear of any and all indebtedness,

liens or charges of any kind or of any description." (pp. 15, 16).

He also stipulates that he shall "during the continuance of this agreement at all times, and at his own cost and expense, keep the said yacht, its hull, tackle, spars, furniture, gear, boats, and the like, in repair" (p. 16).

He further stipulates that he "shall be liable and responsible for any and all loss and damage to hull, machinery, equipment, tackle, spars, furniture or the like" (p. 16).

II. These absolute stipulations for the return of the vessel, for her repair, and for the assumption of liability for her loss, are not discharged by the impossibility of returning her arising from her loss.

The Harriman, 9 Wall, 161.
Jones v United States, 96 U. S. 24, 29.
Jacksonville &c Ry Co., v Hooper, 160 U. S. 514.
Harmony v Bingham, 12 N. Y. 99.
Tompkins v Dudley, 25 N. Y. 272.
Dexter v Norton, 47 N. Y. 62.
Herter v Mullen, 159 N. Y. 28.

In *Jacksonville, &c. Ry. Co. v. Hooper, supra*, the principle is expressed as follows: "The present case * * * is a case of impossibility of performance arising subsequently to the making of the contract. Here the general rule is that such impossibility, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract. * * * Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility. But where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor within his control" (pp. 527, 528).

In *Harmony v Bingham, supra*, the distinction is pointed out between obligations imposed by the law and those assumed by express contract. "It is a well settled rule," the Court say, "that where the law creates a duty or charge, and the party is disabled from performing it without any default in himself, and has no remedy over, then the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract. * * * The only exception which has ever been acknowledged is where a party has contracted to do a thing which the law considers impossible" (pp. 107–108).

In *Herter v. Mullen, supra*, the reason for the distinction between the effect of impossibility of performance occasioned by inevitable accident or the act of God upon an obligation created by express contract, and upon an obligation which the law, implies is said to rest "upon the unwillingness of the law at once to create, impose and exact the performance of an obligation forbidden or rendered impracticable by the interposition of Providence *(School District v. Dauchy*, 25 Conn., 530*)*." p. 43–44.

III. It is urged by the appellant that inasmuch as the obligation of a hirer to return the thing hired depends upon its continued existence, the obligation fails when the thing hired is destroyed; and as the *Kanapaha* was destroyed the appellant is discharged from its covenant to return her.

1. No doubt the general principle is true; and this is the contract the law presumes the parties to have made when it is not shown that they have made a different contract. Nevertheless, the parties may make a different contract if they please, and the hirer may so bind himself absolutely to return the thing without allowance for the contingency of its destruction that if

he does not return it he is liable, whatever be the cause of his failure.

Steele vs. Buck, 61 Ill., 343.
Dexter vs. Norton, 47 N. Y., 62.
Drake vs. White, 117 Mass., 10.
Warth's Executors vs. Mack, 51 U. S. App., 133.

Steele vs. Buck (supra) illustrates the principle, although the language of the covenant in that case was much weaker than in the covenant in the case at bar. The action was debt on a bond given to secure the performance of the covenants of a charter party by which the charterer, among other things, stipulated to return the vessel to her owner at the port of Chicago at the close of the navigation season for the year "in as tight, staunch and good condition as she now is, reasonable wear and tear excepted." The vessel was wrecked during the charter period and became a total loss. The Court held the sureties liable, on the ground that the contracting party must perform his contract, and if loss occur by inevitable accident the law will let it rest upon the party who has contracted that he will bear it. The distinction was adverted to between contracts implied by the law and those made expressly between the parties; in the former case performance may be excused when it becomes impossible through inevitable accident, but in the latter case the party is bound to make his contract good because he might have provided against the inevitable accident.

This distinction rests on sound reason, for in contracts implied by law no part of the obligation is expressed, and the law which imposes the duty also limits it; but where the obligation is expressed, the law presumes that the parties have expressed the whole of it, and will neither add to it nor diminish it. If, in the case cited, the charterer had not expressly agreed to return the vessel, the law, recognizing his duty to return it if it were not destroyed without his fault, would have

presumed that he had promised to do so. The duty—the moral obligation—is all that the law can presume the parties to have intended. *When*, however, the parties formulate their engagements themselves, they substitute for the performance of a duty the performance of a promise, which may be either more or less than the simple duty or moral obligation; and there is no room for presumption that they promised less or more than they meant to perform; the agreement is in writing and it cannot be altered. Consequently, there is no ground left upon which the law can raise a presumption that the parties to the charter meant that the charterer was not to be bound by his promise in any case which they have not specified. Especially is this view reasonable where, as in the case cited, the parties have themselves expressed a limitation upon the charterer's liability, by providing that if by reason of ordinary wear and tear the vessel should not be in so good condition at the end of the charter term as she was at the beginning, the charterer should not be bound by his general covenant to make good that defect. So, where the parties have considered the subject of exceptions and limitations, and have expressed some and omitted others, the law cannot impose upon them those which they have themselves declined to assume.

2. In this case the parties have made their contract in writing, and have absolutely stipulated for the return of the vessel, without allowance for contingencies through which an actual return might become impossible; and the appellants have expressly assumed the risk of such contingencies.

3. The chief reliance of the appellant in support of this contention is the case of *Young vs. Leary*, 135 N. Y., 569, which is supposed by appellant's counsel to be inconsistent with the judgments of the Courts below; but it is not. In that case the engagement of the charterer was held to be only to do what the law implies. In this case the charterer has expressly as-

sumed a liability which is not implied by the law when it is not expressed by the parties.

The general rule for which the appellant contends is expressed by PECKHAM, J., in the case cited, in the following terms:

"The contract in this case comes, as it seems to us, under another class, which relates to the hiring for use of the thing hired, and where an express contract is made to redeliver the article hired upon the determination of the term of hiring. Even in such case of express contract there is implied a condition of the continued existence of the thing which is the subject of the contract, and, if it perish without any fault of the hirer, so that redelivery becomes impossible, the hirer is excused" (p. 576).

But the Court expressly affirm the competency of the parties to make a different contract if they wish to do so. "There is no question," they say, "that a party can, if he so please, bind himself to deliver, notwithstanding the thing may perish which he contracts to deliver" (p. 577).

The precise point decided in *Young vs. Leary* was that the guarantor of the hirer under a charter without covenants for repairs, but with a covenant for delivery at the termination of the charter in the same good condition as the ship was in at the beginning, was not liable for the accidental destruction of the ship by fire, *without fault on the part of the charterer, three months after the charter expired*—not during the charter term—and while the ship was in the charterer's hands under circumstances that amounted to an extension or waiver of the stipulation fixing the time for delivery.

The charter was for one year from October 17, 1884. The vessel was burned at sea in January, 1886. By the charter the charterer covenanted to insure for one year. That was done; and the insurance expired by its own limitation, concurrently with the charter term. The charterer was under no obligation to renew it.

The charterer further stipulated to assume all risks of damage that may happen to the vessel and all liability of every kind and nature for which the vessel or its owners may be responsible *during the term of the charter* which were not covered by insurance. That covenant was held to be limited by its terms to the period of the charter party (p. 574–5). When that period had expired the only liability remaining on the charterer was that imposed by the covenant to deliver the vessel; but as performance at the time was waived by the owner, the measure of the charterer's subsequent liability was fixed by the obligation which rested upon him after the charter period expired, whether imposed by law from the relation of the parties, or, in contemplation of law, adopted by the parties from the covenant in the charter. In either case the obligation was the same, for the express covenant to return the ship was precisely the obligation which the contract of hiring implied: neither more nor less. The Court held that the destruction of the ship under these circumstances, *without his fault*, was a sufficient answer to an action against the guarantor for breach of the covenant, express or implied, to deliver the ship.

In short, in *Young vs. Leary*, the charterer's assumption of risk of loss and damage was restricted to the term of the charter; the loss occurred after the term had expired, and was not covered by the covenant. Consequently the charterer was held not liable.

In reading the opinion of the Court it will be remarked that the argument in regard to the liability of a lessee of real estate under covenants either simply to deliver up at the end of the term, or to repair or keep in repair and deliver up at the end of the term, are treated as applicable to the liability of the charterer of a ship under a charter containing similar covenants, and there can be no doubt that to this extent the argument in the one class of cases is applicable to the other class.

The Court say: "This obligation is subject to the implied condition that the building shall be in existence at the end of the term, and, if before that time it was burned down without the default of the tenant, he is held not liable under his contract," citing authorities (p. 578); and immediately the limitation of this principle is stated in the following language: "It is otherwise if the lessee has covenanted to repair or rebuild *(McIntosh vs. Lown*, 49 Barb., 550, 555; *Phillips vs. Stevens*, 16 Mass., 238*)*."

4. In *Ames vs. Belden*, 17 Barb., 513, the obligation of a charterer to return the vessel at the end of the charter term is discussed at large, and is stated in similar terms to those employed in *Young vs. Leary*. In that case also the competency of the parties to enlarge the liability of the hirer implied by the law from the hiring is recognized, and is illustrated by arguments deduced from the liability of lessees of real estate. After stating the rule, the Court say: "It cannot be doubted, whatever may be the law with reference to common carriers, but that a bailee may enlarge or vary his common-law liability by special agreement; that he may become an insurer of the safety and redelivery of the property, and that, if he does so, he cannot plead in excuse for performance of his undertaking, a disability arising from the act of God (6 Mass., 63; 16 *Id.*, 238). Such a defense would involve the absurdity in a case like this of alleging a calamity apprehended by the parties and against the consequences of which the bailee expressly indemnified the bailor. The class of cases where such a defense is admisible is when the duty or obligation is merely *implied by law*, as the obligation to return the property when the purposes of the bailment are fulfilled. The act of God cannot be pleaded in excuse for the performance of an express covenant when compensation in damages may be awarded (7 Mass., 325; 16 *Id.*, 238; 2 Saunders, 422, note 2; 6 T. R., 759; 12 Wend., 589; 8 Cowen, 298)" *(Ib.*, 515*)*.

IV. The stipulations of the charter in suit are precisely such as in the case of a lease of real estate impose upon the lessee an obligation to rebuild, if the buildings be accidently destroyed during the term without fault of the lessee, and under which the lessee is held in damages for non-performance.

Walton vs. Waterhouse, 2 Saund., 420, and notes.
Bullock vs. Dommitt, 6 T. R., 650.
Brecknock Co. vs. Pritchard, *Ib.*, 750.
Warner vs. Hitchins, 5 Barb., 666.

1. In *Warner vs. Hitchins, supra*, the effect of the covenant to repair is discussed at large, and with much learning, and all the leading authorities on the liability of a tenant in respect to rebuilding are cited and commented on. The question at issue was whether under a covenant on the part of the lessees to surrender up possession of the premises at the expiration of the lease in the same condition they are in at the date of the lease, natural wear and tear excepted, but without express covenant to repair or rebuild, the tenants were bound to put up new buildings in the place of those accidentally destroyed by fire during the continuance of the term. The Court held, upon the principle already stated, that they were not; but in the course of the discussion some of the qualifications of the rule were considered. The Court said, among other things: "It is now, however, settled that when the lease contains on the part of the lessee an express covenant to uphold and repair the premises he is liable to make good such losses, but in all the adjudicated cases where this liability has been held to attach to the lessee he has entered into an express covenant to repair" (p. 668). "The stipulation to repair is the proper one where the lessee assumes to keep and make the premises good from whatever cause the injury may arise, whether from unavoidable accident or negligence" (*Id.*, p. 670). Again: "The covenant to

repair has been in use for centuries. Its appropriate office and design is understood not only by lawyers but laymen, and its omission is a strong reason for supposing that neither party intended by other provisions to assume or impose the obligations which it creates. The covenant to repair has always been regarded as imposing a more extended liability than the covenant to surrender the premises in as good condition as found. And the insertion of the latter covenant has never been considered as superseding the necessity of the former when the intention is to charge the tenant with repairs, even those not made necessary by casualty" (p. 673). Once more, after citing and commenting upon numerous cases, the Court add: "The question in all these cases is how far the parties intended the covenant to extend; and, where it has been incautiously said by Courts that the law will excuse non-performance when by the act of God performance has become impossible, the real defense has been that the parties did not by their contract intend to provide against such losses, and hence the agreement was not broken. Courts may be less inclined to hold that providential losses were within the intent of the parties than those arising from other causes, but when the intent is ascertained the principle of law applicable in either case is the same" (p. 678).

2. Such being the effect of the covenant in this charter to keep in repair, its meaning is certainly carried beyond the possibility of doubtfulness by the hirer's further covenant to be liable for any and all loss and damage to the vessel. This being so, the principle of *Harmony vs. Bingham*, 12 N. Y., 99, and other cases of that character cited above, applies to the case at bar, leading to the conclusion that when the hirer covenanted in this charter to surrender the yacht at the expiration of the term he meant to assume the liability of an insurer against all kinds of accident or loss; that he meant his covenant to be absolute and to comprehend all contingencies that might happen;

that he intended to and did indemnify the owner against such accident as that which occurred to the vessel on the 5th of September. Having made these covenants, he is bound to respond in damages for their breach.

3. The sufficiency of the language of the charter to constitute a covenant to repair is beyond question. The single word 'repair' obliges the party charged to make good all injuries, even to the complete rebuilding of the subject of the agreement, with the alternative of payment of its value, in the event of total destruction.

Beach vs. Crain, 2 N. Y., 86.
Compton vs. Allen, Style, 162.

4. There is no force in the suggestion that the covenants in the charter in suit to repair and to return the vessel ought to be interpreted as if they were one covenant *so* to repair *as* to return the vessel in as good condition as at the start. The covenants in this charter are not so expressed. They are separated from each other by other stipulations. There are, in short, two distinct covenants, and not one.

5. In some of the cases cited reference has been made to the liability of the insurer which a [illegible]e is not understood to assume unless by his express agreement. In the case at bar he has assumed precisely that kind of liability. He covenants that he will "procure security or guaranty to and for the owner in the sum of seventy-five thousand dollars, to secure any and all losses and damages which may occur to said boat or its belongings which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract" (p. 16).

If the charterer had not procured insurance he would clearly have been liable under this covenant for such damages as the owner might have recovered against an insurer.

Jacksonville, &c., Ry. Co. vs. Hooper, 160 U. S., 514.

In *Young vs. Leary, supra*, the charterer was relieved from liability because he did procure the insurance in conformity with his covenant.

In the case at bar, instead of procuring insurance from a third party, the charterer expressly assumed this liability upon himself, and in this respect the case stands as the *Jacksonville Railway* case stood and as the *Leary* case would have stood if no insurance had had been obtained

V. In the Circuit Court of Appeals it was suggested for the first time by the appellant that the breach charged in the libel is only a breach of the covenant to deliver, and that no breach of the covenant to keep in repair is specifically alleged. The answer to this suggestion is that sufficient allegation of breach of the covenant to repair is made out by the charge (p. 5) that the yacht "while in the charge and control of said respondent, its agents or servants as aforesaid, was wrecked and is a total loss"; and respondent admits this allegation *in totidem verbis* (p. 12.).

The allegation of negligence, added to the libel by amendment, is found in the record (p. 21).

On the trial the facts established constitute a breach of the agreement to keep in repair, no less than the covenant to deliver at the end of the charter period. It would therefore have been competent, had the attention of the District Court been called to the point, to have amended the libel by alleging more specifically a breach of the covenant to keep in repair; and, should the Court deem it necessary, it is asked that such amendment be allowed instanter, or opportunity be given for leave to move to amend.

The Charles Morgan, 115 U. S. 69.

Such amendment would merely conform the pleadings to facts proved without objection, and would, in that view, be formal rather than substantial.

The J. E. Trudeau, 54 Fed. R. 907, 912; 4 C. C. A. 657.

SECOND. Independently of the covenants of the charter, the appellant is liable for the destruction of the vessel because it resulted from negligent navigation.

I. Leaving out of view for the moment the covenant in the charter here in suit to keep in repair, and the covenant by which the charterer assumes all liability for loss and injury, there remains the covenant to deliver the yacht at the end of the charter period. She is not delivered. The charterer being sued for breach of the covenant alleges that at the end of the charter period she was no longer in existence. Whether the burden of proof to show that her destruction was due to the charterer's negligence lie upon the owner or the charterer—a question which the Court expressly declined to discuss in the *Leary case*, because the case had been tried without reference to that question (p. 583)—when negligence is established as the proximate cause of the loss of the vessel, the charterer is clearly precluded from setting up her loss as an excuse for noncompliance with his agreement to restore her. He would nowhere be permitted thus to raise a defence out of his own default. In the *Leary* case, speaking of the waiver of punctual delivery pending negotiations for sale, the Court said: "If there were such waiver and extension of the time, a destruction of the vessel in the meantime *without the fault of McKay* would be a destruction before any breach of the contract on his part had occurred and in such case he would not be liable." If therefore in the case at bar the proofs demonstrate that the *Kanapaha* was wrecked through the negligence of her master, this is no excuse for the appellant's breach of its engagement to deliver the vessel at the end of the charter period.

In fact, if there were no covenant at all for the return of the vessel, the hirer would still be liable for her destruction through his own negligence.

Authority would seem to be superfluous upon this point, yet analagous cases are not wanting. Where the lessee covenanted that the buildings he should

erect should at the expiration of the term revert to the lessor, "without damages of any kind except the natural wear of the same," the buildings so erected were destroyed by fire due to the negligence of a stranger. It was held that the negligence of the stranger was imputable to the lessee, and therefore constituted no defence.

Cook vs Champlain Transportation Co.
1 Denio 91.

In another case the lessee covenanted to repair, "damages by the elements or acts of Providence excepted." The house was injured by a flood proceeding from a reservoir which the negligence of a stranger had weakened, and consequently the water escaped. It was held that the damage to the house was not due to inevitable casualty but to negligence, and therefore afforded no defence.

Polack vs Pioche 35 Cal. 416.

II. The interpretation of the covenant to keep in repair is in no way affected by the *Leary* case, because there was no such covenant in the charter there, and also because the charterer's assumption of liability for risks not covered by insurance was limited to a period which had expired when the loss took place.

III. The evidence clearly proves the negligence.

1. The sea was smooth, the night clear, the yacht had been sailing all day in sight of land, the reef and the current are well known to mariners and are indicated on charts and Sailing Directions, the captain was familiar with the coast, the harbor lights which the captain expected to make at sunset had not been sighted an hour and more later: when suddenly the vessel ran on the reef, and was found to be four miles nearer the shore than the captain supposed her to be.

Statement of Facts, *supra*.

2. This situation is *prima facie* proof of negligent navigation.

The Webb, 14 Wall.' 406.
Booker v. Smith, 40 F. R., 839.

IV. The captain gives three reasons to rebut the presumption of negligence and to account for the accident on grounds which he pretends would relieve him of responsibility: first, an unknown current; second, the absence of light in the lighthouse; third, an imperfect chart of the coast.

Test. Atkinson, pp. 100, 101.

Neither of these excuses is valid.

1. The current is not unknown, but is well known to navigators and is described in the Sailing Directions issued by the United States Hydrographic Office.

Test. Knight, pp. 190, 191.
Sailing Directions, pp. 205, 206.

The current being well known, the master is chargeable with knowledge of it.

The Webb, 14 Wall, 406.
The Nicanor, 44 F. R. 504.

In view of his long experience in navigating the waters off the north coast of Cuba (pp. 103, 112) either his assertion that he did not know of this current (p. 101) is untrue, or else his ignorance of it is inexcusable.

2. The lights had been extinguished during the war, as the captain well knew (pp. 102–3, 197, 198). The captain said he had been told at Ponce that the lights on the coast had been relit and were burning (pp. 101–2). The lights at Nuevitas harbor had in point of fact been broken and were not yet repaired.

Be this as it may, the fact that he did not make the light for an hour after he had expected to see it showed either that the light was not lit or that he was out of his course. In either case it was his duty to keep off

shore so as to avoid the reefs which he knew skirted the coast.

The Montana, 17 F. R. 377.
The City of Para, 44 F. R. 689.

3. It is true that the United States chart is imperfect; but the reef is correctly shown on the British Admiralty charts,—with which the captain was acquainted, as shown by his reference to them (p. 127).—is correctly described in the United States Sailing Directions, and is generally known to mariners.

Test. Knight, p. 188, 189, 190.
Sailing Directions, p. 197.

Under these circumstances the master is chargeable with knowledge of the reef.

The Mascot, 48 F. R. 917; 57 F. R. 512.

4. The stranding was really caused by the captain's negligence in not allowing for the landward set of the current. He supposed himself to be six miles off shore at dark, and then laid a straight course to pass Nuevitas East Point light six miles to seaward. In running twelve miles in one hour, he deviated four miles from the course he intended to take. This is negligence.

The Webb, 14 Wall. 406.

5. The fact that the reef at the place of stranding was not shown on his charts is of no importance, because he had laid his course, as he supposed, to carry him four miles outside the position of the reef, and if his course had been correct he would not have struck it at all. In other words, he had not laid a course to carry him on the reef, in the expectation of finding deep water where the reef was, relying upon a defective chart; and so the stranding did not result from a mistake in the chart: it resulted from his being borne by the current, without his knowledge, out of the course he had laid and supposed himself to be sailing.

6. The failure of the master to take bearings, or to take any observation of the shore, especially at sunset, so as to correct his estimate of his distance from the shore, when he knew he was on a dangerous coast, was negligence.

Bazin v Steamship Co. 3 Wall. Jr. 229
The City of Para, 44 F. R. 689
Union Ins. Co. v Dexter, 52 F. R. 152.

Third Point.

The Circuit Court of Appeals were right in taking as the measure of damages the value of the vessel stipulated in the charter.

I. Counsel for the appellant assert in their brief (p. 3) that "it can be shown that her original cost at Cramps was $59,000, and that she was sold four years later for $50,000." The same assertion as to her cost is repeated elsewhere.

What this assertion is founded on does not appear. It is not founded upon anything in the record, for there is no such evidence there. It is not in accordance with the facts as understood by the appellee. He bought the yacht some four years before the charters in suit, and used her very little. She cost him, not $50,000, but $75,000. He was never able to learn what the builders received for her, though he endeavored to ascertain; but he was informed during the negotiations for her purchase that her builders had said they would not take a contract to duplicate her for $200,000. He refused an offer of $90,000 while she was in commission before the Spanish War broke out.

These assertions, on one side or the other, are not facts of the case contained in the record; but the ap-

pellant is not warranted in the statements made by its counsel, either by the record or by the facts.

II. The argument for the appellant is taken up largely with an effort to show that the sum of $75,000 mentioned in the agreement of suretyship is not liquidated damages, but a penalty.

There is no such question in the case. Neither of the courts below have assumed or decided that this sum is liquidated damages.

This sum is used in the contracts for two purposes: First, to ascertain the value of the vessel; second, to limit the liability of the charterers in case of breach of covenant. Incidentally, it furnishes the measure of damages in case of the total loss of the vessel, but that is because it is her value; not because the charterers expressly agreed to pay that sum in case they should fail to return her at the end of the charter period; what they should pay is determined by the law on the basis of her value.

III. The measure of damages in case of total loss is clearly the value of the ship.

1 Sedgw. Dam., §§ 242-3.

IV. The value of the ship was ascertained and stipulated by the parties in the charter.

1. The charter provides: "For the purposes of this charter the value of the yacht shall be considered and taken at the sum of $75,000; and the Hirer shall procure security or guarantee to and for the owner in the sum of $75,000 to secure any and all losses and damages which may occur to said boat or its belongings, which may be sustained by the owner by reason of such loss or damage and by reason of the breach of any of the terms or conditions of this contract" (p. 16).

2. The object of this clause was to fix the value of the yacht. The reason why it was so fixed by the parties instead of being left to be ascertained, in case

of need, by the courts, is sufficiently apparent from a remark made by Capt. Atkinson. He said, "A yacht has no commercial value—no market value. * * * The value of a yacht is a fancy value. * * * A yacht has no value except a fancy valuation (p. 110).

3. Where the parties themselves fix values, as of ships, buildings, cargoes, merchandise, or other articles, their agreement is, in the absence of fraud, conclusive upon them.

Marine Ins. Co v Hodgson, 6 Cr. 206.
Pleasants vs. Maryland Ins. Co., 8 Cr., 56.
Kane vs. Commercial Ins. Co., 8 Johns., 229.
Whitney v American Ins. Co, 3 Cow. 210.
P. & S. Steamship Co v Phoenix Ins. Co. 89 N. Y. 559, 564-5.
Hart v Pennsylvania R. Co., 112 U. S. 331.
Zimmer v N. Y. C. & H. R. R. Co., 137 N. Y. 460.
Graves v Lake Shore R. R. Co., 137 Mass., 33.
Coupland v Housatonic R. R. Co. 61 Conn., 531, 545.

The agreement as to value is conclusive even though the goods have a market value.

V. The principle is well recognized in maritime law, and is constantly observed in ascertaining the value of ships, for various purposes and under various circumstances. A few illustrations show the extent and variety of its application.

A ship was insured for £6,000 under a policy in which her value was stipulated at £6,000. She was sunk by collision and the insurer paid the insurance in full and afterwards brought an action in the name of the owners against the vessel in fault and recovered £5,500 damages. The owners insured claimed to participate in the recovery on the ground that the real value of the vessel was £9,000, upon the theory that the value stipulated in the policy constituted an es-

toppel as between insurer and insured only in an action to recover the insurance. This contention was overruled, and the court held that in an action between insurers and insured involving the value of a vessel covered by valued policy, and based upon the policy, the value fixed in the policy is conclusive.

North of England Ins. Assn. vs Armstrong
L. R. 5 Q. B. 244

In the case of a constructive total loss, while the right to abandon is to be determined with reference to the actual value of the ship when repaired in comparison with the cost of repairing, which may differ widely from the stipulated value, yet the total loss having been thus ascertained the value at the time of loss is conclusively fixed by the policy.

Irving v Manning, 6 C. B. (H. of L.) 391.

So, again, though the ship be shown to have deteriorated greatly when the loss occurred, the stipulated value still controls.

Shaw v Felton, 2 East 108

The question of valuation is discussed at length by Mr. Arnould, with the conclusion that the object of a valuation is to fix an estimate of the subject insured, and to supersede the necessity of proving the actual value by specifying a certain sum as the actual value ; that the rule applies whether the actual value be greater or less than the agreed value ; and that only fraud will vitiate the agreed valuation, upon the ground that the fraud vitiates the whole contract.

1 Arnould Marine Ins. (6th Ed) 300-302.

He says, among other things :

"From the difficulty of proving the insurable value of the ship in case of loss, almost all policies on ship are valued : the principle upon which the value is generally calculated in this country is, to estimate *the ship's worth to her owner at the outset of the risk*, in-

cluding stores, outfit and money advanced for seamen's wages, taking care to cover the whole with premiums and commissions.

"However much the ship may be damaged by wear and tear, and consumption of her stores and provisions at the time of loss, even though the loss takes place at the very termination of a long voyage, yet the valuation calculated on the above principle is the sum which the assured will be entitled to recover (if they have insured up to the amount of the valuation) in cases of total loss; and in cases of partial loss it will equally regulate the amount of average payable by the underwriter."

The learned author's proposition that the valuation may be vitiated by fraud on the ground that such fraud would vitiate the whole contract, might suggest a question, which cannot, however, arise in the case at bar. Upon familiar principles, if a bailee fail to return the object bailed in accordance with the terms of his contract, the bailor may either sue on the contract as for a breach in *assumpsit*, or, in a proper case, in covenant, or even, if a penalty be provided, in debt; or else he may elect to treat the bailee's fault, if such there be, as conversion, and waving the contract, sue in tort. If he adopt the latter course the question might arise whether the value stipulated in the contract should be deemed conclusive in an action, not brought upon the contract, but in avoidance of it.

Stevens v Low, 2 Hill 132.

That question does not arise in this case, for the libellant here is not suing as in tort, for conversion, but as in *assumpsit* for breach of contract. The language of the charter in suit is that "for the purpose of this charter the value of the yacht shall be considered and taken at the sum of seventy-five thousand dollars." It matters not, therefore, which of the covenants be the subject of the breach. Whenever an action is predicated upon the breach of any provision the stipulated valuation remains controlling.

VI. The question of over valuation does not arise in in this case, because it is not pleaded in the answer.

McKinlay vs. Morrish, 21 How, 343.
The Bertha, 36 C. C. A., 509, Conkling's Adm., 594.

VII. The stipulated valuation of the vessel at $75,000 is neither a penalty nor liquidated damages.

1. The distinction between the valuation of the thing which is the subject of a contract and an agreement upon the amount of damages to be paid on breach of the agreement is perfectly clear. So the agreed value of time or service, or goods sold and delivered, is entirely distinct from an agreed sum to be paid for breach of a contract to hire, or to serve, or pay for goods. The Courts have never refused to enforce the agreement of parties putting a value on the subject matter of a contract where there is no charge or proof of fraud.

See cases *supra*.

The same distinction is illustrated in cases where the Courts permit a witness to state the value of a thing injured as of a time both before and after the injury, but refuse to permit him to testify as to the amount of the loss sustained by the owner by reason of such injury.

Van Deusen vs. Young, 29 N. Y., 9, 36.
Roberts vs. N. Y. El. R. R. Co., 128 N. Y., 455.

4. There could be no good objection to enforcing the stipulation even if it were in strictness a covenant for the payment of liquidated damages.

(a) In late cases the rule is expressed that damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement was made are in their nature uncertain, and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and

the amount fixed is not on the face of the contract out of all proportion to the probable loss.

Curtis v Van Bergh, 161 N. Y. 47.
Ward v H. R. Building Co. 125 N. Y. 230.

(b) In the case at bar the element of uncertainty has already been mentioned.

(c) As to the reasonableness of the valuation, it appears that the hire was $2500 a month, so that the value was estimated on the basis of two and a half years' hire: surely a moderate rate. In proportion to the demurrage, $500 a day—which is clearly liquidated damages—the valuation is still more conservative.

(5) The appellant is mistaken in supposing that the evidence tends to show the actual value of the *Kanapaha* was $30,000.

The only testimony on which the appellant relies to sustain this position is that of Captain Atkinson, the master of the yacht in the employ of the appellant, through whose unexcused negligence the wreck occurred. His testimony, given without opportunity to the owners' counsel to cross-examine as to his competency, is as follows:

Q. What was the fair value of the yacht "Kanapaha" in the summer of 1898 and at the time of the accident, that is, prior to the accident?

A. I would preface my answer by first stating that a yacht has no commercial value. You will understand that—

Q. You mean no market value?

A. No market value.

The Witness: The value of the yacht is a fancy value. According to my best belief, I said in my statement in New Orleans that I valued the yacht at $50,000, but if I was put on my oath, and she was at her dock and was put up at auction, that she wouldn't realize $30,000—between $30,000 and $40,000. The reason I stated $50,000 was that I wanted to give what

I considered a fair value of the yacht. As I said before, a yacht has no value excepting a fancy valuation.

Q. Capt. Atkinson, what, in your opinion, would the yacht "Kanapaha" have sold for in September, 1898, or at any time in the summer of 1898 prior to the accident, if offered for sale in New York?

A. My opinion is that she would not realize $30,000.

Record, pp. 110, 111.

The witness lays stress on three points in this testimony: *first*, that a yacht has no market value; its value is a matter of fancy; *second*, that her fair value, according to the canons of his own fancy, was $50,000; *third*, that if forced to sale at auction she would not bring the value his own fancy set upon her, and not more than $30,000.

Now, it is obvious that if it be competent for Captain Atkinson to value her by the standard of his fancy, it is competent for her owner and her charterer to value her by the standards of their fancy; and this is what they did. The witness concedes that the standard adopted was the only standard that could be applied, and though he differ from the parties to the charter in his conclusions, this only shows the difficulty of arriving at the fact, and justifies the wisdom and foresight of the parties in settling it by agreement.

(6) The case of "The Conqueror" in this court (166 U. S. 127), cited by the appellant, contains nothing opposed to the judgment appealed from in this case, but on the contrary suggests a principle which, if applied here, shows the agreed valuation to have been entirely reasonable. That principle is that there is a reasonable relation between the hire of a yacht and her value, insomuch that if you know one you can reason more or less correctly to the other. In that case the yacht cost $75,000. The Court below awarded to the owner $15,000 as the value of her use for five months, at the rate of $3,000 a month. This court

protested that their credulity was quite unable to bear the strain of the proposition that her use was worth the amount awarded (p. 134), and held the testimony insufficient to support the award. In this case there is no complaint that the monthly hire was excessive. It is, therefore, a fair basis from which to reason to her value. Had it been $3,000 a month instead of $2,500 this Court, on the authority of "The Conqueror," might well have repudiated the suggestion that her value could be taken at so low a figure as $75,000; but, taking the value of the use at $2,500 a month, it can hardly be questioned that the parties in their agreement fixed the value at as low a rate as this Court would deem within the limits of reasonableness.

Fourth Point.

The Circuit Court of Appeals correctly held, overruling the District Court to the contrary, that the $10,000 paid by the charterer for the hire of the yacht was not to be deducted from her value in measuring the owner's damages upon breach of the hirer's stipulations for her safe return.

I. If the value of the vessel is the measure of damages, and if her value was fixed by stipulation at $75,000, it would seem that the appellant is bound to show a very clear agreement as the basis for any other rule of damages.

II. The District Court relied on the Third clause of the so-called agreement of suretyship. It reads thus: "Third, that our liability hereunto shall in no case exceed the sum of $75,000" (p. 17). It does not warrant the conclusion reached by the District Court.

The true construction of this provision must be ascertained in the light of the principle that as the guar-

antor is only liable in respect of covenants broken by his principal, and not of covenants performed, no money paid out by the principal in respect of covenants performed avails either party in abatement of his liability in respect of covenants broken by the principal.

III. The charter money having been paid by the principal the covenant to pay it was performed, and not broken, and no liability ever attached, as for breach of it, either under the charter or under the guaranty.

1. The charter money, $10,000. for the four months was expressed to be payable on the signing of the charter (p. 15).

It appears to have been so paid, for the check is dated on that day.

It is not claimed that the charter was delivered before the money was paid in accordance with its terms.

Consequently when the charter was delivered there was no liability for that $10,000.

2. The agreement in the charter to procure security seems to be framed on the theory that the $10,000. is no longer a liability, because the amount of the security to be furnished is exactly the stipulated value of the vessel. It was not necessary that the hire should be included in the security, because the owner had the security in his own hands; he need not, and did not, delivert he charter or the vessel until it was paid. This security could not have been intended to cover the breach of a condition which had been performed before the charter became operative by delivery, and therefore could never be broken.

3. If the District Court were right, it would seem that while the parties fixed the value of the ship by their agreement, knowing—as they are presumed to know—that the value is the measure of damages, they made this agreement intending that the charterer should not be liable for the full value, but for $10,000 less than the value.

Had they meant anything so unusual the charterer should have taken care to express it distinctly, because this covenant is construed most strongly against him, in the sense in which the owner is taken to have understood it, on the principle that if the construction be doubtful, that one of the two must be adopted which makes the covenant most beneficial to the promisee, and this is the construction for which the libellant now contends.

Marvin vs. Cone, 2 Cow., 781, 806.

4. The fact that the charterer insured its own risk for $60,000, as stated by the District Court (p. 267)—it was really £12,000, or $58,500 (pp. 225-6)—is not significant, because if this sum did not cover a risk of $75,000, it also did not cover a risk of $65,000.

Fifth Point.

The exceptions taken by the appellant to rulings of the District Court upon questions of evidence are untenable.

I. The first exception challenges the admission in evidence of the check for $5,000 given by the appellant in payment of the hire of the yacht under the first charter party, and the admission of the receipt for $1,476.64 for payment of insurance premiums under the first charter. The $5,000 check, Exhibit 6, and the record of its admission are found at pages 44, 45 to 253, and the receipt for insurance premiums, Exhibit 8 (p. 225) was admitted at page 52.

Both the check and the receipt were competent to show that the charter money in the one case and the insurance premiums in the other were paid by the *Sun*, and as evidence of Lord's authority and of the ratifica-

tion by the Company of his act in executing the first charter, and his authority, or the ratification of his act in respect to that, is evidence tending to show authority to make the second charter between the same parties.

They are evidence for the further purpose of showing that the vessel was in the service of the *Sun* under an earlier charter at the time when the charter in suit was executed by the same agent.

II. The second and third exceptions relate to the admission in evidence of statements published in the *Sun* newspaper May 3, 1898 and September 11, 1898 (pp. 70, 71). These extracts were properly received as admissions on the part of the appellant that the vessel was in its service.

Admissions in a newspaper are competent evidence against the proprietor.

Frye vs Bennett, 4 Duer 247, 254: 28 N. Y. 324–330.

Malloy vs. Bennett, 15 Fed. Rep. 371, 374.

If Mr. Dana, as he admits, took the statements he read in the paper as evidence that the *Kanapaha* was employed by the *Sun* (p. 232), the appellant cannot reasonably object to their sufficiency for the information of the Court.

III. The fourth exception relates to the admission of Macdaniel's letter to Chubb, Exhibit 14 (pp. 259, 148).

In connection with the proof that insurance was effected and paid for by the appellant, this letter is admissible as *res gestæ*.

IV. The fifth exception is directed to the admission of a conversation between Albert Lee, Editor of *Harper's Round Table*, and Mr. Lord (p. 115).

The testimony was admissible as *res gestæ*.

The evidence is, at all events, of no importance; for

the fact that money was received from Harper Brothers by the *Sun* for the conveniences afforded to reporters was otherwise proved without objection (Test. Macdaniel, p. 59).

V. The sixth exception relates to the question addressed to Bradley, the Notary Public who took Lord's acknowledgment to the agreement of suretyship of May 14 (pp. 125–6). He was asked if he knew whether the words "*for the Sun Printing and Publishing Association*", part of the signature, were there at the time the acknowledgment was taken, and he answered he did not. He was then asked "Q. You will not say they were not?" This question was objected to and admitted over the respondent's exception, and the witness answered "No, I will not say they were not."

The question was manifestly competent, but the testimony was afterwards rendered unimportant by the appellant's admission that the whole signature including the words in question was written by Lord (p. 201)

VI. The seventh exception challenges the following question put to the witness Knight: "Q. Can you state from your experience of those harbors whether that reef is a well-known reef?" (referring to the reef upon which the *Kanapaha* was wrecked (p. 189).

The question was proper as bearing upon the supposed negligence of the master of the yacht. If the reef was well known, he is chargeable with knowledge of it, and was negligent if he did not lay his course so as to keep out of the way of it. Whether or not the reef is well known is a question of fact, and the witness was shown by his experience in navigating those waters to be competent to answer it.

VII. The eighth exception calls in question Knight's explanation of the way to ascertain the distance of a ship off shore (fols. 1015, 1016).

The testimony of the master had shown that he had not used any means to ascertain the distance of his vessel from the shore beyond taking his latitude at noon (pp. 127–28). It was competent to show that he might have taken the distance and how it could have been done, in order to prove that he was not exercising suitable care and skill in navigating the ship.

VIII. The ninth and tenth exceptions relate to questions addressed to Knight (pp. 194–5) enquiring whether, under the circumstances mentioned, it would be possible to ascertain, up to sunset, the true position of the steamer, and whether a current was setting in towards the shore.

These questions call for statements of fact which the witness's experience rendered him competent to testify to.

IX. The eleventh exception is addressed to a question put to Knight (p. 195) as follows: "Q. Suppose you were taking a northwesterly course along the north coast of Cuba, bound for the old Bahama Channel and expecting to see Maternillos light off Nuevitas harbor about the time it became dark, and you were at sunset about 18 miles east of Nuevitas harbor. Failing to see the light at dark, what would you do?"

It was objected to on the specific grounds that it assumes facts not proven, and that it is hypothetical and calls for a conclusion of the witness.

The facts had been proved by the testimony of Atkinson (pp. 100, 129–30). The captain had testified further that the sun set from six to half-past (p. 122), that the yacht was making about 12 knots (p. 120), and that she stranded about 7 miles east of Nuevitas harbor (p. 99); which makes the distance assumed in the question.

It was competent to ascertain by inquiry of an experienced sea captain what good seamanship would require to be done under such circumstances.

Transportation Line vs. Hope, 95 U. S. 297.

Union Ins. Co. vs. Smith, 124 U. S. 405, 420–3.
Walsh vs. Washington Ins. Co., 32 N. Y., 427, 443.

No objection was made to the form of the question.

X. The twelfth and thirteenth exceptions challenge the propriety of admitting in evidence pages 122 and 123, and page 5, of the sailing directions issued by the United States Hydrographic Office with reference to the Caribbean Sea and the Gulf of Mexico and adjacent waters (pp. 204, 205, 197).

This is an official publication issued by the Navy Department pursuant to U. S. R. S. §§ 431, 432 for the information and guidance of mariners; and the extracts read in evidence are competent, as maps or other publications would be, for the purpose of showing the position of the reef and of the current, and of charging the master of the vessel with notice of both.

Evanston vs. Gunn, 99 U. S., 660.

XI. The fourteenth exception is directed to a question put to the witness Jungen (p. 208) asking him to explain a paper pasted in the inside of the cover of the Sailing directions. The objection was that the question was incompetent, improper and as calling for an explanation as to the contents of a paper which speaks for itself (p. 273). The witness explained that the paper was pasted in the book to show the date of issue and also for the owner of the book to enter on the receipt the number of notices to mariners of corrections to be made in the book, and to indicate to him whether he had made the correction on his own chart to conform to the notice.

The question and answer appear to be perfectly harmless and not in any way prejudicial to the respondent. The notice on the paper seems to be intended to ask persons using the book from time to time to make corrections to conform with later information.

XII. The fifteenth exception assumes that the appellant offered, and was denied an opportunity, to prove that the yacht had been grossly over-valued in the charter party (p. 274). No such offer was made during the trial, nor does any suggestion of over-valuation appear in the record. Moreover, there is no allegation in the answer of over-valuation; and in the absence thereof appellant was not entitled to offer evidence on that point.

McKinlay vs. Morrish, 21 How., 343.

XIII. The twenty-second exception relates in part to the allowance of interest by the District Court from the time of the breach of the charter party, viz. October 1st, 1898. Libellant is entitled to interest from that date.

Winch vs. Ice Co., 86 N. Y., 618, 620.
Little vs. Banks, 85 N. Y., 258, 267.

XIV. The rest of the appellant's exceptions relate to the question of damages (fifteenth to seventeenth, twenty-third to twenty-ninth) and to the question of its liability under the charter (eighteenth to twenty-first, thirtieth); and these subjects have already been discussed in the preceding points.

Sixth Point.

The decree of the Circuit Court of Appeals should be affirmed, with costs.

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